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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1410

FATE THOMAS, Sheriff, Nashville Metropolitan Jail,
Petitioner,

v.

MARK JEROME BEASLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

RESPONSE NOT PRINTED

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To the United States Court of Appeals for the Sixth Circuit

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 5, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals — F.2d —, not yet reported, is reproduced as Appendix A. The May 2, 1973 memorandum and order of the District Court overruling the state's motion to reconsider is Appendix B. The Feb. 9, 1973 memorandum decision of the District Court is Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 5, 1974. This petition for certiorari is timely filed within ninety days of that day. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Is pre-trial habeas corpus relief to a state criminal defendant precluded by the principles of **Younger v. Harris,** 401 U.S. 37 (1971) and **Ex parte Royall,** 117 U.S. 241 (1886) where no special circumstances exist to justify federal interference with state criminal proceedings?

(2) Does the double jeopardy clause of the Fifth Amendment preclude retrial of one of four state criminal defendants where a mistrial is properly granted to protect the rights of the other three and the trial judge refuses to sever and proceed to try the fourth man alone?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction to equal protection of the laws."

Statutes governing issuance of the writ of habeas corpus are codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. **Power to Grant Writ.**

(a) Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the District Courts and any Circuit Judge within their respective jurisdictions . . .

* * * * * * * *

(c) "The writ of habeas corpus shall not extend to a prisoner unless——

(3) he is in custody in violation of the Constitutional laws or treaties of the United States . . ."

STATEMENT OF THE CASE

The respondent, Mark Jerome Beasley, and three other men were brought to trial on armed robbery charges in Nashville on September 19, 1972. Each man was represented by separate court-appointed counsel. Shortly after the State's first witness had begun her testimony, two of the court-appointed defense attorneys informed the trial judge that they had signed warrants for the arest of three of the four defendants, including the defendant Beasley. One of the attorneys had signed a warrant for the arrest of his own client after hearing the testimony of the victim.

After hearing the above description of the circumstances, the court then ruled:

> "That out of fairness and justice and in order to eliminate and remove any question of doubt as to the representation of these defendants by attorneys of record, that a mistrial should be and is to be granted."

The court then polled the defendants and received the consent of all except Beasley, who (speaking last) objected to the mistrial, and indicated his desire to proceed. The Court refused to sever his case, and set the entire matter for trial four weeks later on October 16, 1972. New attorneys were appointed to replace those with the apparent conflicts of interest.

When his case came on for trial on October 16, Beasley entered a plea in bar on double jeopardy grounds, and when this motion was overruled, he declined to go to trial on the merits pending appeal. But the state appellate courts held that they had no power to consider an interlocutory order of the type presented, and shortly thereafter Beasley filed an application for the writ of habeas corpus in the United States District Court in Nashville. The State admitted the controlling factual allegations, claiming that the granting of the mistrial was within the sound discretion of the trial court and that, in any event, the application was premature. The State lost, appealed, and lost again in the Sixth Circuit when that court held, in an opinion by Chief Judge Phillips, that the application for the writ was not premature and that neither "manifest necessity" or "the ends of public justice" required a mistrial.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Opinion in This Case Is in Conflict With Applicable Decisions of This Court and Settled Case Law.

A. In a long line of cases beginning with **Ex parte Royall,** 117 U.S. 241 (1886), the Court has held that, while the District Courts clearly possess power to grant a pre-trial writ of habeas corpus, they should refrain from doing so until the available state remedies have been exhausted unless there are special circumstances which justify disregard of the fundamental principles of comity. This doctrine is discussed at some length in the landmark decision **Fay v. Noia,** 372 U.S. 391, 415-420 (1963) where the Court cites with approval its previous holding in **Cooke v. Hart,** 146 U.S. 183, 194-195 (1892):

> "While the federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the federal constitution or laws, * * * the practice of exercising such power before the question has been raised and determined in the state court is one which ought not to be encouraged. The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are, equally with the federal courts, charged with the duty of protecting the accused and the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired."

Neither **Royall** nor its progeny can be read as a blanket prohibition to all pre-trial habeas corpus relief. The cases indicate there are exceptional circumstances where such relief is warranted. The classic case is **In re Neagle,** 135 U.S. 1 (1890), where a federal deputy marshal was discharged from a Califor-

nia murder indictment for killing one David Terry in defense of Justice Field. In cases involving the authority and operations of the general government, and where procedural obstructions make theoretically available State processes ineffective to protect the habeas petitioner's rights, pre-trial habeas corpus relief is proper. But in this case there were no such circumstances.

B. As a practical matter there is no difference between an injunction against state criminal proceedings and the granting of pre-trial habeas corpus relief. It is clear that a federal court could not, consistent with the principles set forth in **Younger v. Harris,** 401 U.S. 37 (1971), enjoin a state criminal proceeding without showing that the state is proceeding in bad faith to harass or intimidate the applicant. We fail to see why the same or similar principles are not applicable in the present situation. It is hardly consistent with **Younger v. Harris** and its companion cases to abort a state criminal proceeding when none of the usual reasons for disregarding principles of comity are present. Yet that is exactly what the Sixth Circuit has done in this case.[1]

C. The Court of Appeals misread this court's opinion in **Illinois v. Somerville,** 410 U.S. 458 (1973). There can be no doubt that the mistrial was ordered for the reasons stated by the trial judge—to protect the interests of the indigent defendants and to avoid the appearance of impropriety. Neither the District Court nor the Court of Appeals seems to think that a mistrial was improper so far as the two defendants were concerned whose attorneys had obvious conflicts of interest. It is merely the decision not to sever Beasley's case and proceed with the trial which troubles them. Judge Phillips states flatly:

---

[1] See generally Amsterdam, **Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trials,** 113 U.Pa. L.Rev. 793, 882 et seq. for a discussion of the exceptions to the general abstention doctrine.

"A severance at that time would have been the appropriate remedy."

There is no authority for such a statement. In **Illinois v. Somerville,** *supra*, it was held that a mistrial was justified when, after jeopardy had attached, it was discovered that the indictment was defective. Pointing out that the conviction could not possibly be upheld in the circumstances, this Court held that mistrial was not improper "since the trial court could reasonably have concluded that the 'ends of public justice' would be defeated by having allowed the trial to continue." It is interesting to compare the **Somerville** case with the present one. All that was saved in **Somerville** by granting the mistrial was the time and effort that would be required in a retrial. As Mr. Justice White's dissenting opinion points out, even this was not a certainty: There was a possibility that Mr. Somerville would be acquitted outright, thus obviating the need for a new trial. We look at the majority opinion, however, for the words which give meaning to the term "ends of public justice":

> "If a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy and money for all concerned. Here the trial judge's action was a rational determination designed to implement a legitimate State policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant."

If it is conceded, as we think it must be, that the mistrial order was proper for the petitioner's three co-defendants, it becomes clear that exactly the same public interest that justified the mistrial in **Illinois v. Somerville** would justify the refusal to sever and the granting of the mistrial over the petitioner's objection. The only difference is that a retrial of the same case would be a necessity in the present instance, whereas a verdict

of acquittal in the **Somerville** case would have relieved the state of the burden of retrial. The Sixth Circuit's erroneous interpretation of the rule of **Illinois v. Somerville** should not be allowed to stand uncorrected.

CONCLUSION

The Court should issue a writ of certiorari to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted

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Certificate of Service

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit has been sent to Mr. Harold D. Hardin, Attorney at Law, 213 3rd Ave. N, Nashville, Tennessee.

W. Henry Haile
Assistant Attorney General

APPENDIX A

No. 73-1628

United States Court of Appeals
For the Sixth Circuit

Fate Thomas, Sheriff, Nashville Metropolitan Jail Appellant, v. Mark Jerome Beasley, Appellee.	Appeal from the United States District Court for the Middle District of Tennessee.

Decided and Filed February 5, 1074.

Before Phillips, Chief Judge, and Weick and Peck, Circuit Judges.

Phillips, Chief Judge. District Judge L. Clure Morton granted Mark Jerome Beasley's application for a writ or habeas corpus. The decision of the District Court was based upon a finding that Beasley already had been put in jeopardy for the offense for which he was being held in custody awaiting trial, in violation of the Fifth Amendment to the Constitution of the United States. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. **Benton v. Maryland,** 395 U.S. 784, 793 (1969).

The State of Tennessee appeals. We affirm.

Beasley was arrested and jailed in November 1971. Along with three others he was indicted for armed robbery in January 1972 and trial was set for June 1972. Beasley was represented

by an attorney in the office of the Public Defender of Davidson County, Tennessee. On the day of the trial the Public Defender announced that he had a serious conflict of interest and could not represent both Beasley and one of his co-defendants. Thereupon an attorney in private practice was appointed by the State trial court to represent Beasley. The case was continued again on September 18, 1972, because the chief prosecution witness was observing a religious holiday. At that time Beasley's motion to dismiss for lack of a speedy trial was denied.

The case came to trial on September 19, 1972. A jury was impaneled and sworn and testimony commenced. The State's first witness, the prosecutrix, had completed a substantial portion of her testimony before the court recessed for lunch. During the lunch recess, the State trial judge learned that counsel for two of the other defendants (but not including Beasley) had served previously as special night judge of the Court of General Sessions of the Metropolitan Government of Nashville and Davidson County, and in that capacity had signed the arrest warrants for the defendants. Due to this discovery, the trial judge stated that his only alternative was to declare a mistrial and requested defense counsel to consent thereto. Three defendants agreed to a mistrial, but Beasley objected.

Instead of proceeding with the trial of Beasley before the jury which already had heard a substantial part of the testimony of the prosecutrix, the State trial judge declared a mistrial as to Beasely over his objection, denied Beasley's motion for a severance, and reset the case for trial at a later date. When the case was called again for trial, Beasley entered a plea of double jeopardy and renewed his motion to dismiss for lack of a speedy trial. The State trial judge overruled both the plea of double jeopardy and the motion to dismiss for lack of a speedy trial. Thereafter, he also dismissed Beasley's petition for rehearing.

Thereupon Beasley filed a petition for certiorari and supersedeas in the Tennessee Court of Criminal Appeals, raising his

defense of double jeopardy. The Court of Criminal Appeals dismissed the petition and the Supreme Court of Tennessee denied certiorari in unpublished decisions.

At the time the writ of habeas corpus was granted by the District Court on February 9, 1973, Beasley had been confined in jail continuously since November 1971.

We agree with the District Court that jeopardy attached at the first trial and that Beasley's plea of double jeopardy is a conclusive bar to retrial. **United States v. Jorn,** 400 U.S. 470, 479 (1971); **Downum v. United States,** 372 U.S. 734 (1963).

The prohibition of the Double Jeopardy Clause "is not against being twice punished, but against being twice put in jeopardy. . . ." **United States v. Ball,** 163 U.S. 662, 669 (1896).

We are unwilling to hold that Beasley must be returned to jail and be confined there pending a second trial, which clearly would be barred by his double jeopardy plea. As District Judge Morton said, "Under the state process petitioner must remain confined in the Nashville Metropolitan Jail until he is subjected to a second trial. If petitioner's claim is a valid one, each day he remains in jail adds to the deprivation of his rights guaranteed by the double jeopardy clause."

The State contends that the writ was granted prematurely because Beasley has not exhausted his State remedies. It is argued that he should be subjected to a second trial, where his plea of double jeopardy again would be entered; and that if Beasley should be convicted at the second trial, the appellate courts of Tennessee ought to be afforded an opportunity to pass upon the plea on its merits.[1]

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[1] The dismissal of Beasley's petition for certiorari and supersedeas by the Tennesse Court of Criminal Appeals was on procedural grounds. That court said, "[t]his is an interlocutory order from the Davidson County Criminal Court, and the defendant has not yet been to trial."

The exhaustion of remedies contention is answered conclusively by the recent decision of this court in **Rivers v. Lucas,** 477 F.2d 199 (6th Cir. 1973).[2] Rivers was indicted for murder in the first degree. He plead guilty to manslaughter. A few months after sentencing, his conviction was reversed and remanded for further proceedings. Rivers moved to have the original indictment quashed or at least reduced to manslaughter. This motion was denied by the State trial court. Rivers appealed this denial all the way through Michigan's appellate process without getting a decision on the merits.

In **Rivers** this court affirmed the grant of a conditional writ of habeas corpus saying:

> "The only thing left for him to do in the state courts is to submit to trial on the murder charge. Since exposure to the risk of conviction is the very thing he is seeking to avoid, this step [submitting to trial] is not necessary for a complete exhaustion of state remedies where freedom from double jeopardy is the right sought to be preserved." 477 F.2d at 203.

It is to be reemphasized that, in the case at bar, the first trial ended in a mistrial. Before the second trial commenced, Beasley moved to dismiss the indictment on double jeopardy grounds. As in **Rivers,** the entire appellate process in the State courts was exhausted without obtaining a decision on the merits. In the present case, as in **Rivers,** Beasley has done everything available within the State court system that it is possible for him to do to avoid retrial.

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[2] On October 15, 1973, the Supreme Court vacated our judgment in **Rivers v. Lucas,** — U.S. —, 42 L.W. 3226, and remanded the case to this court for consideration of the question of mootness in light of **People v. McMiller,** 389 Mich. 429 (1973). Although a panel of this court subsequently dismissed **Rivers** as moot, the principle enunciated in **Rivers** with respect to exhaustion of remedies still stands as the law of this circuit.

The Double Jeopardy Clause of the Fifth Amendment prohibits a defendant from being subjected to two trials for the same offense unless "manifest necessity" or the "ends of justice" require the declaration of a mistrial. **Illinois v. Somerville,** 410 U.S. 458 (1973). "Manifest necessity" and the "ends of justice" do not require a second trial in the present case. The first trial of Beasley could have been completed before the jury which already had heard a substantial part of the testimony of the prosecutrix, in spite of the fact that a mistrial was declared as to other defendants. A severance at that time would have been the appropriate remedy. Since it is manifest under the authorities hereinabove cited that jeopardy already had attached as to Beasley, the Double Jeopardy Clause precludes the State of Tennessee from subjecting him to a second trial.

Affirmed.

APPENDIX B

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Mark Jerome Beasley

vs.

Fate Thomas, Sheriff, Nashville Metropolitan Jail

Civil Action No. 6858

Order

This petition for writ of habeas corpus, 28 U.S.C. § 2254, was filed on January 15, 1973. This court, holding that petitioner had previously been placed in jeopardy for the same offense for which he was being held in custody, ordered petitioner's release on February 9, 1973. Respondent filed a motion to reconsider this order on February 13, 1973, and a hearing was held on this motion the same day.

Respondent by his motion to reconsider contends that petitioner is not being unlawfully confined so that he may again be put in jeopardy in violation of the Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment. Respondent further contends that this court erred in ruling on the petition prior to the exhaustion of the state remedies that would be available to petitioner if he were subjected to a second trial and convicted. 28 U.S.C. § 2254(b).[1]

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[1] "§ 2254. **State custody; remedies in Federal courts**

* * * * * * *

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not

Respondent also argues that the effect of the court's order of February 9, 1973, is to enjoin a pending state criminal prosecution in contravention of 28 U.S.C. § 2283.[2]

This court, of the opinion that its order of February 9, 1973, was correct, orally denied the motion of respondent at the hearing. The court also ordered that the release of petitioner be upon his recognizance, without surety. Fed.R.App.P. 23(c).

At the hearing on the motion to reconsider, both parties agreed that no hearing on the petition was required because only legal issues remained after respondent filed his answer.

The court reaffirms its order of February 9, 1973, and its oral ruling of February 13, 1973, denying respondent's motion to reconsider. The court is of the opinion that petitioner has exhausted his state remedies under 28 U.S.C. § 2254 in that he has presented his claim of constitutional violation to the State Court of Criminal Appeals and to the State of Tennessee's highest court. Thus the state courts have had an opportunity to pass on the claim. Presently there exists no state forum in which petitioner can effectively present his claim. The court believes this constitutes exhaustion of petitioner's state remedies under § 2254. **See Humphrey v. Cady,** 405 U.S. 504, n. 18 (1972); **Wilwording v. Swenson,** 404 U.S. 249, 250 (1971); **Fay v. Noia,** 372 U.S. 391, 438 (1963). The exhaustion requirement does not require repetitive presentations of the claim to the state

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be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

[2] "§ 2283. **Stay of State court proceedings.**

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

courts. **Duke v. Wingo,** 386 F.2d 304 (6th Cir. 1967), **cert. denied** 397 U.S. 1013 (1970); **Humphrey v. Cady,** *supra.*

> "The only thing left for him to do in the state courts is to submit to trial . . . Since exposure to the risk of conviction is the very thing he is seeking to avoid, this step is not necessary for a complete exhaustion of state remedies where freedom from double jeopardy is the right sought to be preserved. . . . [T]here is a valid consideration of judicial economy." **Rivers v. Lucas,** No. 72-1792 (6th Cir., decided and filed April 24, 1973) at 6.

The Sixth Circuit Court of Appeals in **Rivers v. Lucas,** *supra,* also passed on the question as to whether the granting of pretrial habeas corpus relief amounts to an injunction to stay state criminal proceedings. The Court stated:

> "It is also contended by the appellants that the granting of habeas corpus to a state prisoner being held for trial amounts, in effect, to issuing an injunction to stay state proceedings in contravention of 28 U.S.C. § 2283. The cases cited by appellants do not support their argument, and we have found no Supreme Court decision which holds that pretrial habeas corpus relief is the equivalent of an injunction to stay proceedings in a state court. We decline to follow **Drury v. Cox,** 457 F.2d 764 (9th Cir. 1972), to the extent that it equated the two types of action." *Id,* at 7.

As to the issue of double jeopardy, this court reaffirms its ruling that petitioner was formerly placed in jeopardy. **See United States v. Henderson,** 472 F.2d 157 (6th Cir. 1973).

The motion to reconsider is hereby denied.

/s/ L. CLURE MORTON
United States District Judge

APPENDIX C

In the United States District Court for the Middle District of Tennessee, Nashville Division

Mark Jerome Beasley

vs.

Fate Thomas, Sheriff, Nashville Metropolitan Jail

Civil Action No. 6858

Memorandum

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which no issues of material fact exist.

The petitioner is presently incarcerated in the Nashville Metropolitan Jail and is charged with the offense of armed robbery. He seeks release from his confinement on the ground that his being tried for the offense with which he is charged would result in his being placed twice in jeopardy, in violation of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment. **Benton v. Maryland,** 395 U.S. 784 (1969). The facts are as follows.

The petitioner was arersted and incarcerated in the Nashville Metropolitan Jail in November, 1971, where he has remained ever since. Along with four others, he was indicted for armed robbery and trial was set for June, 1972. The case was continued until September 18, 1972, due to defense counsel's conflict of interest, and another attorney was appointed by the court to represent the petitioner. The case was again continued on September 18, 1972, for the reason that the chief prosecution witness was observing a religious holiday. At this time, the petitioner's motion to dismiss for lack of a speedy trial was

denied. The case came to trial on September 19, 1972; a jury was impaneled and sworn, and testimony commenced. A recess was called after the State's first witness, the prosecutrix, had completed a substantial portion of her testimony. At this juncture, the trial judge learned that counsel for two of the other defendants had previously sat as Special Judges and had signed the arrest warrants for the defendants. Due to this discovery, the judge stated that his only alternative was to declare a mistrial and requested defense counsel to consent thereto. The other defendants in the case agreed to a mistrial, but the petitioner objected to a mistrial as to him.[1] The court, opining that it was impossible to separate the trial, denied the petitioner's motion for a severance, declared a mistrial as to all of the defendants, dismissed the jury, and reset the case for October 16, 1972. On that date the trial court overruled petitioner's motion to dismiss for lack of speedy trial and on grounds of former jeopardy and postponed the trial. Thereafter, petitioner filed a motion to rehear which was overruled on October 27, 1972.

An appeal, by Petition for Certiorari and Supersedeas, was taken to the Tennessee Court of Criminal Appeals on the strength of petitioner's double jeopardy contentions, but on November 6, 1972, that tribunal declined to review the case on the merits, holding that there could be no review of the appeal because the order appealed from was interlocutory in nature. The Tennessee Supreme Court denied certiorari on January 2, 1973.

Petitioner, who is scheduled to face a second trial later this month, filed this petition on January 15, 1973. The defendant

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[1] Petitioner's attorney at the first trial states by affidavit that one of the reasons petitioner wished to proceed with his trial was that he had been incarcerated in the Nashville Metropolitan Jail allegedly with as many as twenty prisoners in the same cell. Exhibit 2 to Petition.

filed his answer on January 29, 1973, in which he contended that the writ should not be granted by reason of the alleged failure of petitioner to exhaust state remedies. Defendant does not contend that petitioner is not ". . . in custody pursuant to a judgment of a State court . . ." 28 U.S.C. § 2254(a).

The questions raised by the petition and answer are purely legal ones. Thus, no hearing is required. **Barker v. Ohio,** 330 F.2d 594 (6th Cir. 1964).

The court will first consider the exhaustion issue. At the time this petition was filed, the petitioner had presented this exact same claim to the state trial court, the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court. The trial court ruled against petitioner apparently on substantive grounds, while the Court of Criminal Appeals denied the Petition for Certiorari and Supersedeas on procedural grounds. The Court of Criminal Appeals, citing the case of **Cole v. State,** 223 Tenn. 20, 442 S.W.2d 246 (1969), ruled that the matter raised by the petition was interlocutory and not an appealable final judgment. Thus, the Court of Criminal Appeals ruled in effect that no state process was then available to hear the petition on the merits. The Tennessee Supreme Court simply refused to hear the petitioner's case by denying certiorari.

The court fails to see how petitioner could do more under state law as he exhausted all State avenues available. He presented this same claim to all the appropriate State courts, which denied relief. In order for State remedies to be exhausted, it makes no difference whether or not the State courts ruled on the merits or denied relief on procedural grounds. **United States ex rel. Turner v. Rundle,** 438 F.2d 839, 845 (3rd Cir. 1971); **Harris v. Brewer,** 434 F.2d 166, 168 (8th Cir. 1970).

The Supreme Court has stated that the exhaustion requirement of 28 U.S.C. § 2254 ". . . refers only to a failure to ex-

haust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court." **Fay v. Noia,** 372 U.S. 391, 399 (1963).

There being no state remedies still open to petitioner now or at the time he filed this petition, the court hereby rules that petitioner has complied with the exhaustion requirement of § 2254(b).

Even if the court were to accept the defendant's contention that petitioner has not exhausted state remedies, this court nevertheless has authority under § 2254(b) to hear and determine this petition on its merits at this time.

Section 2254(b) provides:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, **or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."** (Emphasis supplied.)

The defendant contends that the prospective trial, the direct appeals process, and the Tennessee Post Conviction Relief Act procedure are effective processes available for petitioner to vindicate his double jeopardy claim. Such a contention ignores the basis of petitioner's claim. Petitioner does not contend that he has been convicted at a second trial in violation of the double jeopardy clause. Petitioner does contend that after having once been placed in jeopardy, he is being unconstitutionally detained so that he may again be put in jeopardy.

"The prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'"

Downum v. United States, 372 U.S. 734, 736 (1963), **quoting from United States v. Ball,** 163 U.S. 662, 669 (1896). The Double Jeopardy Clause forbids the unnecessary infliction of a second trial with "the heavy personal strain which a criminal trial represents for the individual defendant . . . ." **United States v. Jorn,** 400 U.S. 470, 479 (1971). The Court in **Jorn,** quoting from **Green v. United States,** 355 U.S. 184, 187, 188 (1957), stated that the policy underlying the Double Jeopardy Clause

> ". . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." **United States v. Jorn,** *supra*, at 479.

Under the State process the petitioner must remain confined in the Nashville Metropolitan Jail until after he is subjected to a second trial. If petitioner's claim is a valid one, each day he remains in jail adds to the deprivation of his rights guaranteed by the Double Jeopardy Clause. The State process, which by its effect would sanction this aggravated deprivation, is clearly ineffective to vindicate petitioner's claim that he is now being unlawfully detained so as to face a second trial for the same offense.

"If the States withhold effective remedy, the federal courts have the power and the duty to provide it." **Fay v. Noia,** *supra*, at 441.

Thus this court must rule on the substantive issue of whether or not the mistrial was wrongfully declared at the trial of September 19, 1972. The holdings and rationale of the various United States Supreme Court opinions make it clear that peti-

tioner must prevail on this issue. The most recent significant Supreme Court opinion in this area is **United States v. Jorn,** *supra*. In **Jorn,** the defendant was charged with willfully assisting in the fraudulent preparation of income tax returns. Five of the Internal Revenue Service witnesses risked potential prosecution for related offenses. After the first of these witnesss was called, but before direct examination, defense counsel suggested that these witnesses be informed as to their constitutional rights. This the trial judge did; however, the judge felt that his warning, and an alleged earlier warning by the Internal Revenue Service, were insufficient to protect the witnesses. He then dclared a mistrial. The case was set for retrial, but an interventing pretrial motion to dismiss was sustained on the ground of former jeopardy. The Government appealed.

The Court in **Jorn** stated that, absent a motion by the defendant for a mistrial, or unless manifestly necessary, the trial judge must not foreclose the defendant's option under the Double Jeopardy Clause of the Fifth Amendment to have his trial completed by a particular tribunal. The Court stated that the trial court must not *sua sponte* declare a mistrial until a scrupulous exercise of judicial discretion results in the conclusion that a manifest necessity exists and that the ends of public justice would not be served by a continuation of the proceedings. The Court held that the district judge, who appeared to have given no consideration to the possibility of a trial continuance, had abused his discretion in discharging the jury and declaring a mistrial, and thus rendered reprosecution of the defendant violative of the Double Jeopardy Clause of the Fifth Amendment.

In this case there appears to have been no manifest necessity to justify the *sua sponte* declaration of mistrial as to petitioner. Defendant has not presented to the court any reasons to support a conclusion that the foreclosure of petitioner's opportunity to have his case tried by this particular jury was justified by any manifest necessity or by service to the ends of public

justice. The trial court gave no reasons, and the court knows of no reasons why the trial could or should not have proceeded as to petitioner. The interests of public justice could have been served by severance and completion of the trial as to petitioner.

The discretion of the court to *sua sponte* declare a mistrial and discharge the jury before it has reached a verdict should be exercised "only in very extraordinary and striking circumstances. . . ." **Downum v. United States,** *supra*, at 736, **quoting from United States v. Coolidge,** 2 Gall. 364, F.Cas.No. 14858 (CC Mass.). The power of the trial court to discharge a jury before it renders a verdict ". . . ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . ." **United States v. Jorn,** *supra*, at 481, **quoting from United States v. Perez,** 9 Wheat. 579, 580 (1824).

In determining whether to declare a mistrial over the objection of a criminal defendant and retry defendant, the trial court must resolve any doubts "in favor of the liberty of the citizen. . . ." **Downum v. United States,** *supra*, at 738.

Even under the apparently overruled "sole interest of defendant" rule[2] expressed by the Supreme Court in **Gori v. United States,** 367 U.S. 364 (1961), the trial court would appear to have erred in its refusal to allow the trial of petitioner to continue. In **Gori** the Court in affirming a conviction at a second trial stated:

> "Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." *Id.*, at 369.

In this case the mistrial was granted apparently on grounds that a single trial of all defendants would be more convenient and more economical.

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[2] See **United States v. Jorn,** *supra*, at 482, 483.

Accordingly, the court holds that petitioner was wrongfully denied his right to have his case tried by the jury impaneled on September 19, 1972. At this trial petitioner was put in jeopardy and no manifest necessity existed to justify the sua sponte declaration of a mistrial as to petitioner.[3]

Having once been put in jeopardy, petitioner may not again be put in jeopardy for the same offense for which petitioner is currently in custody awaiting trial.

The court hereby orders that the writ of habeas corpus shall issue. Defendant is hereby ordered to release from custody immediately the petitioner, Mark Jerome Beasley.

/s/ L. CLURE MORTON
United States District Judge

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[3] See **United States v. Walden,** 448 F.2d 925 (4th Cir. 1971), for the same holding under similar facts.